Filed 4/25/19 P. v. Chavez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALBERTO RAY CHAVEZ, Defendant and Appellant.	E070715 (Super.Ct.No. FWV1600437) OPINION

APPEAL from the Superior Court of San Bernardino County. Katrina West, Judge. Affirmed.

Jill M. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant, Alberto Ray Chavez, guilty of (1) aggravated sexual assault of a child under 14 years of age (Pen. Code, § 269, subd.

(a)(3))[1]; (2) two counts of sexual intercourse or sodomy with a child who is 10 years of age or younger (§ 288.7, subd. (a)); (3) three counts of oral copulation or sexual penetration of a child who is 10 years of age or younger (§ 288.7, subd. (b)); and (4) two counts of committing a lewd or lascivious act upon a child who is under 14 years of age (§ 288, subd. (a)). The jury found true the allegation that two of defendant's crimes involved multiple victims. (§ 667.61, subds. (b) & (e)(4).) The trial court sentenced defendant to prison for a term of 140 years to life.

Defendant raises three issues on appeal. First, defendant contends the penetration element of the aggravated sexual assault conviction (Count 1) is not supported by substantial evidence. (§ 269, subd. (a)(3).) Second, defendant asserts the penetration element of the conviction for sexual intercourse or sodomy with a child (Count 2) is not supported by substantial evidence. (§ 288.7, subd. (a).) Third, defendant contends the Count 7 conviction for oral copulation or sexual penetration of a child is not supported by substantial evidence. (§ 288.7, subd. (b).) We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. BACKGROUND

The victims are Jane Doe No. 1 (Doe-1) and Jane Doe No. 2 (Doe-2). Doe-1 and Doe-2 are half sisters, who share the same mother (Mother). Mother had a total of four children. Doe-1 was born in April 2004. Doe-2 was born in September 2008.

---

[1] All subsequent statutory references will be to the Penal Code unless otherwise indicated.

In 2007, Mother began dating Jesse. Jesse, his siblings, and his parents lived together on a property with several structures in Chino (the family property). Jesse had a sister named Roxanne who lived on the family property. In 2007, defendant was dating Roxanne and residing with her on the family property. In November 2007, Mother moved onto the family property with her children, including Doe-1. Mother, Jesse, and the children lived in the back house. Defendant and Roxanne resided in the main house. Mother worked in 2007. While Mother was at work, Roxanne cared for Mother's children. Defendant was in the house while Roxanne cared for Mother's children.

Mother moved out of the family property in February 2008 when she temporarily ended her relationship with Jesse. After approximately one month apart, Mother and Jesse resumed their relationship. Jesse moved into Mother's residence in Perris. Doe-2 was born in September 2008. Jesse's parents and Roxanne, i.e., Doe-2's grandparents and aunt, would care for Doe-2 while Mother was at work. In 2009, Jesse's family, i.e., his parents, Roxanne, and defendant, also moved to Perris.

B. COUNT 1

Doe-1 met defendant when she was three years old. Defendant began sexually touching Doe-1 when she was three years old. Most of the touching occurred at the family property. During the first incident of sexual touching, defendant told Doe-1 he "wanted to show [her] something" in an abandoned trailer on the family property. After entering the trailer, defendant pulled down Doe-1's pants, and forced her onto a bench. Doe-1 laid on the bench on her stomach. Defendant stood behind Doe-1. Defendant

pulled his pants down and penetrated Doe-1's buttocks with his penis. The penetration was painful to Doe-1. Doe-1 described the penetration as forceful. Doe-1 explained that she struggled to get away from defendant by saying no and attempting to squirm away. When defendant penetrated Doe-1, she continued to struggle but was tired. Doe-1 did not recall how the incident ended. After defendant penetrated Doe-1's buttocks, she experienced pain when sitting down or using the restroom.

Defendant was interviewed by police detectives. Defendant described touching Doe-1. Defendant said, "Oh, well, we'd be, she'd, um, be bent over and I'd be rubbing on her, I had her by the hips doing that. And she'd be like, all right, hurry up. And I told her, hold on, I'm almost done. So yeah, I'd hold her. I'd have her, yeah, I was holding her by the hips."

A detective said that if defendant was using his hands to hold Doe-1's hips while she struggled, then it would be logical that his penis was penetrating Doe-1. Defendant denied that his penis penetrated Doe-1. Defendant explained, "The way she'd be bent over, I'd have my penis, like, down her clit, and then, because I was holding . . . my hands are so big, I could hold my penis reach down [inaudible 01:10:47] motion." Defendant explained that he typically ejaculated into his hand or a towel. During closing argument, the prosecutor said that Count 1 consisted of defendant sodomizing Doe-1 in the abandoned trailer.

C. COUNT 2

On another day, defendant told Doe-1 he was going to purchase candy at a gas station. Doe-1 accompanied defendant to the gas station. Defendant took Doe-1 into

the gas station restroom. Doe-1 sat on the sink in the restroom. While in the restroom, defendant penetrated Doe-1's buttocks with his penis.

During the police interview, the detectives asked defendant about the incident in the gas station restroom. Defendant said he rubbed his penis in an "up and down" motion on Doe-1's vagina and buttocks. When rubbing Doe-1's buttocks, defendant "rub[bed] the edge of the anus, like so [his] penis [was] in between the crack[]."

On occasions when defendant sexually touched Doe-1, he used lubricant on himself and Doe-1. Defendant said he may have accidentally penetrated Doe-1 while "trying to masturbate," but he would have been unaware of any penetration because he "was too focused on [his] own behavior." Defendant's sexual encounters with Doe-1 ceased when she moved to Perris. During closing argument, the prosecutor asserted Count 2 consisted of defendant sodomizing Doe-1 in the gas station restroom.

D. COUNT 7

Defendant began touching Doe-2 when she was five years old. During the first incident with Doe-2, defendant touched Doe-2's buttocks with his penis. Doe-2 explained that defendant sometimes pushed his penis into her buttocks, which was painful to Doe-2. Defendant touched Doe-2 when she visited her grandparents' house. Doe-2 visited her grandparents every weekend. The sodomy typically occurred in defendant's and Roxanne's bedroom. Every time Doe-2 visited, while in the living room, defendant would "tickle" Doe-2's vagina over her clothes, with his hands.

When describing the touching, Doe-2 explained, "[H]e would put his private part on my butt, and then he would put his hands on my private part, because I don't know

why. But whenever I had my clothes on, he would tickle me in the private part; and whenever I—and when I had my pants off, he did it to me whenever." Doe-2 described being on the bed, in the bedroom, with her hands and knees on the bed, "like a dog" with her "butt . . . up in the air." Defendant positioned himself behind her on his knees, on the bed. Defendant gave Doe-2 his phone, so she would play games on the phone while defendant "touched his private part in [her] butt."

During the police interview, defendant said he started touching Doe-2 by fondling her vagina over her clothes. Defendant said, "And then that went on for a couple months or, not really like me all the time, every time she came over I was around her, but every now and then I would rub on her, just purely with my hands. I wasn't doing nothing else at the time." Then, after the couple of months passed, defendant began rubbing his penis on Doe-2's buttocks. Defendant said he rubbed his penis on Doe-2's anus. A detective then asked, "Did you ever rub her vagina?" Defendant replied, "There was a time, not a time, but sometimes I would, I would, uh, turn her around and she would lean on her back and I'd rub my penis on her too." Defendant explained that he used lubricant on himself and Doe-2. Defendant described one incident wherein he used lubricant on Doe-2, and he "kind of slipped," which resulted in him "sliding," and he "almost penetrated her butt." Defendant estimated that he touched Doe-2 in a sexual manner once or twice per week for approximately 18 months.

During closing argument, in regard to Count 7, the prosecutor said, "This is another one of those oral copulation or sexual penetration. [*sic*] . . . Sexual penetration is any penetration however slight. [Doe-2] talks about the touching of her vagina

underneath the clothing, and he talks about every now and then 'I would rub on her just with my hands.' "

DISCUSSION

A. STANDARD OF REVIEW

We " ' " 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " ' " (*People v. Brooks* (2017) 3 Cal.5th 1, 57.) " 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.' " (*People v. Clark* (2011) 52 Cal.4th 856, 943 (*Clark*).)

" 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

B. AGGRAVATED SEXUAL ASSAULT

Defendant contends substantial evidence does not support the penetration element of his aggravated sexual assault conviction. (§ 269, subd. (a)(3).)

The aggravated sexual assault statute provides: "Any person who commits any of the following acts upon a child who is under 14 years of age and seven or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] . . . [¶] (3) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286." (§ 269, subd. (a)(3).)

"Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." (§ 286, subd. (a).) "[S]odomy requires something more than penetration of the buttocks [citations], but does not require penetration past the anal verge or into the anal canal." (*People v. Paz* (2017) 10 Cal.App.5th 1023, 1033 (*Paz*).) "[T]he anal verge connects the end of the anal canal to the anal margin. [Citations.] [¶] 'The anal margin begins approximately at the anal verge . . . . It represents the transition from the squamous mucosa to the epidermis-lined perianal skin, and extends to the perianal skin.' [Citation.] The outer 'boundary [of the anal margin] is indistinct . . . , and anatomically;' its location varies by person." (*Id.* at pp. 1034-1035.)

In sum, "the terms anal verge, anal margin, perianal area, perianal folds, and perianal skin all describe at least part of the anal opening—the outer boundary of the anus." (*Paz, supra*, 10 Cal.App.5th at p. 1035.) Therefore, "sexual penetration requires penetration of the tissues that surround and encompass the lower border of the anal canal—that is, it requires penetration past the buttocks and into the perianal area but does not require penetration beyond the perianal folds or anal margin." (*Ibid.*)

However, "mere penetration of the buttocks is not sufficient to establish penetration of the anal opening. 'An intrusion into the space between a person's buttocks, while perhaps a necessary step on the path to intrusion of the anal opening, is not, in itself, an intrusion into the anal opening.' " (*Ibid.*)

During the police interview, defendant said he is six feet, four inches tall and 385 pounds. This evidence supports a finding that defendant is a fully-grown adult male. Doe-1 was born in April 2004. Doe-1 moved to the family property in Chino in November 2007, and moved out in February 2008. This evidence reflects Doe-1 was three years old at the time of the incident in the abandoned trailer. One can reasonably infer from Doe-1's age that she was a small child.

Doe-1 described laying on a bench on her stomach. Defendant stood behind Doe-1. Defendant pulled his pants down and penetrated Doe-1's buttocks with his penis. The penetration was painful to Doe-1. Given the size differential between defendant and Doe-1, the jury could reasonably infer that defendant penetrated past Doe-1's buttocks into Doe-1's anal opening because it would be difficult for a fully-grown adult male to avoid the anal opening of a small child while penetrating her buttocks. Doe-1's experience of pain during the penetration supports the inference that defendant penetrated beyond Doe-1's buttocks into her anal opening. If defendant merely placed his penis between Doe-1's buttocks and did not penetrate further, then it is unlikely she would have experienced pain that continued when she sat down and used the restroom. In sum, substantial evidence supports the finding that defendant penetrated Doe-1's anal opening.

Defendant contends the penetration element is not supported by substantial evidence because there is not " 'precise and specific testimony' " reflecting defendant penetrated Doe-1's anal opening, as opposed to merely her buttocks. Defendant writes, "She never described any penetration into the 'perianal area' or any contact whatsoever with her anal canal." Doe-1 was born in April 2004. Doe-1 testified in April 2018, when she was nearly 14 years old.

Paz provides, "In all sex-crime cases requiring penetration, prosecutors must elicit precise and specific testimony to prove the required penetration beyond a reasonable doubt. [Citation.] We caution prosecutors not to use vague, euphemistic language and to ask follow[-]up questions where necessary." (*Paz*, *supra*, 10 Cal.App.5th at p. 1038, fn. omitted.)

Our Supreme Court has addressed the issue of generic testimony, i.e., non-detailed testimony, in child sexual abuse cases. (*People v. Jones* (1990) 51 Cal.3d 294, 313-314.) Our Supreme Court held that generic testimony can constitute substantial evidence if the victim "describe[d] the *kind of act or acts* committed with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy)." (*Id.* at p. 316.)

In the instant case, Doe-1 described being sodomized in the abandoned trailer. She also described experiencing pain due to the penetration. Although Doe-1 did not specifically describe how far defendant penetrated beyond her anal opening, as

explained *ante*, her testimony is sufficient to support the jury's finding that defendant penetrated her anal opening.

Defendant asserts Doe-1's testimony that she experienced pain during the penetration does not support an inference that defendant penetrated her anal opening because, given the size difference between defendant and Doe-1, simply placing his penis between her buttocks (without penetrating her anal opening) would cause pain.

Defendant's argument presents a different inference that could be made from the evidence of Doe-1 experiencing pain. Under the substantial evidence standard of review, " 'if the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " (*People v. Perez, supra*, 2 Cal.4th at p. 1124.) In other words, defendant's assertion that the circumstantial evidence can be interpreted in a manner that reflects he is innocent of the offense is not persuasive because we must view the evidence in the light most favorable to the judgment. (*People v. Brooks, supra*, 3 Cal.5th at p. 57.) In viewing evidence in the light most favorable to the judgment, we interpret Doe-1's testimony that she experienced pain as supporting the inference that defendant penetrated her anal opening.

C. SODOMY

Defendant asserts substantial evidence does not support the penetration element of his sodomy conviction in Count 2. (§ 288.7, subd. (a).)

Count 2 concerns section 288.7, subdivision (a): "Any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age

or younger is guilty of a felony." The law related to sodomy and penetration is set forth *ante*, so we do not repeat it here.

During the police interview, defendant said he is six feet, four inches tall and 385 pounds. This evidence supports a finding that defendant is a fully-grown adult male. Doe-1 was three years old during the time of defendant's crimes against her, which supports an inference that Doe-1 was a small child. Defendant said he used lubricant on himself and Doe-1 when having sexual contact with her. Doe-1 said that, while in the gas station restroom, defendant penetrated Doe-1's buttocks with his penis.

During the police interview with defendant, one of the detectives asked about the incident in the gas station restroom, and the following exchange occurred:

"[Detective]: Now, was it only the vaginal rubbing? Or what else did you do?

"[Defendant]: Um, I rubbed it on her butt, too.

"[Detective]: On her butt too? Now, when you rubbed her butt, did you rub the edge of the anus, like so your penis is in between the cracks?

"[Defendant]: Yeah.

"[Detective]: Okay. So, not in?

"[Defendant]: No, not in. Just rubbing around.

"[Detective]: Around it? Okay. Now, would you rub in a circular motion, up and down?

"[Defendant]: It'd be up and down."

Doe-1's description of defendant's penis penetrating her buttocks and defendant's admission that his penis was on "the edge of the anus" support an inference

that defendant's penis penetrated Doe-1's anal opening. Further, a reasonable inference from the evidence is, given the size differential between Doe-1 and defendant and the use of lubricant, that when defendant was moving his penis up and down in Doe-1's buttocks, the tip of defendant's penis repeatedly passed and penetrated Doe-1's anal opening. Accordingly, we conclude substantial evidence supports the Count 2 sodomy conviction.

D. SEXUAL PENETRATION

Defendant contends substantial evidence does not support his Count 7 conviction for sexually penetrating Doe-2 because Doe-2 failed to describe any acts of penetration. (§ 288.7, subd. (b).)

Count 7 concerns section 288.7, subdivision (b): "Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger is guilty of a felony." " 'Sexual penetration' is the act of causing the penetration, however slight, of the genital or anal opening of any person . . . for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (§ 289, subd. (k)(1).) " 'Unknown object' shall include . . . any part of the body, including a penis, . . . or . . . any other part of the body." (§ 289, subd. (k)(3).)

When describing the touching, Doe-2 explained, "[H]e would put his private part on my butt, and then he would put his hands on my private part, because I don't know why." Doe-2 said her "private part" referred to her "front part," i.e., her vagina. The foregoing evidence reflects defendant touched Doe-2's vagina. During the police

interview, one of the detectives asked defendant, "Did you ever rub her vagina?" Defendant replied, "There was a time, not a time, but sometimes I would, I would, uh, turn her around and she would lean on her back and I'd rub my penis on her too." This evidence also supports a finding that defendant touched Doe-2's vagina.

Defendant explained that he used lubricant on himself and Doe-2. Defendant described one incident wherein he used lubricant on Doe-2, and he "kind of slipped," which resulted in him "sliding," and he "almost penetrated her butt." This evidence supports a finding that the lubricant was slippery and its use sometimes led to sliding.

Defendant estimated that he touched Doe-2 in a sexual manner once or twice per week for approximately 18 months. Defendant began touching Doe-2 when she was five years old. This evidence supports a finding that Doe-2 was a small child when defendant touched her sexually. During the police interview, defendant said he is six feet, four inches tall and 385 pounds. Also during the police interview, defendant said, "[M]y hands are so big, I could hold my penis reach down [inaudible 01:10:47] motion." This evidence supports a finding that defendant is a fully-grown adult with large hands.

In sum, one can reasonably find from the evidence that defendant rubbed Doe-2's vaginal opening with large, slippery, lubricated hands. Given these circumstances, it is reasonable to infer that defendant's hands did not remain solely on the external area of Doe-2's genitalia. The size and slipperiness of defendant's hands reasonably imply that defendant penetrated Doe-2's vaginal opening. Accordingly, we conclude substantial evidence supports defendant's conviction for sexual penetration in Count 7

(§ 288.7, subd. (b)). (See generally *People v. Clark, supra,* 52 Cal.4th at p. 943 [“ ‘Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence’ ”].)

Defendant asserts it is speculation that he penetrated Doe-2’s vagina because there is no direct evidence that he touched Doe-2 beyond her external genitalia. As set forth *ante*, there is circumstantial evidence supporting a reasonable inference that defendant penetrated Doe-2’s vaginal opening. Circumstantial evidence constitutes substantial evidence. (*People v. Clark, supra,* 52 Cal.4th at p. 943.) Accordingly, we find defendant’s argument to be unpersuasive.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
Acting P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.